

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

MICHELLE JULIE RONQUILLO,

Plaintiff,

V.

NANCY A. BERRYHILL,
Acting Commissioner of
Social Security Administration,

Defendant.

Case No.: 3:18-cv-00306-MMD-WGC

Report & Recommendation of United States Magistrate Judge

Re: ECF Nos. 13, 16

This Report and Recommendation is made to the Honorable Miranda M. Du, United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and the Local Rules of Practice, LR 1B 1-4.

Before the court is Plaintiff's Motion for Summary Judgment seeking reversal of the final decision of the Commissioner and the payment of benefits. (ECF No. 13.) The Commissioner filed a Cross-Motion to Affirm and Opposition to Plaintiff's motion. (ECF Nos. 16, 17.)

After a thorough review, it is recommended that Plaintiff's motion be granted; the Commissioner's cross-motion to affirm be denied; and, that this matter be remanded for further administrative proceedings consistent with this Report and Recommendation.

I. BACKGROUND

On July 17, 2014, Plaintiff completed an application for disability insurance benefits (DIB) under Title II of the Social Security Act, alleging disability beginning June 12, 2014. (Administrative Record (AR) 169-175.) The application was denied initially and on reconsideration. (AR 132-141.)

1 Plaintiff requested a hearing before an administrative law judge (ALJ). (AR 143-44.) ALJ
2 John Heyer held a hearing on March 27, 2017, in San Francisco, California. (AR 67-85.) Plaintiff,
3 who was represented by counsel, appeared and testified on her own behalf at the hearing.
4 Testimony was also taken from a vocational expert (VE). On April 26, 2017, the ALJ issued a
5 decision finding Plaintiff not disabled. (AR 10-21.) Plaintiff requested review, and the Appeals
6 Council denied the request, making the ALJ's decision the final decision of the Commissioner.
7 (AR 1-6, 168.)

8 Plaintiff then commenced this action for judicial review under 42 U.S.C. § 405(g) in the
9 United States District Court for the District of Nevada, as she now resides in Nevada. Plaintiff
10 argues that the ALJ impermissibly rejected the opinions of her treating physician, Yvette Bordelon,
11 M.D., Ph.D.

12 **II. STANDARDS**

13 **A. Disability Process**

14 After a claimant files an application for disability benefits, a disability examiner at the state
15 Disability Determination agency, working with a doctor(s), makes the initial decision on the
16 claimant's application. *See* 20 C.F.R. §§ 404.900(a)(1); 416.1400(a)(1). If the agency denies the
17 claim initially, the claimant may request reconsideration of the denial, and the case is sent to a
18 different disability examiner for a new decision. *See* 20 C.F.R. §§ 404.900(a)(2), 416.1400(a)(2).
19 If the agency denies the claim on reconsideration, the claimant may request a hearing and the case
20 is sent to an ALJ who works for the Social Security Administration. *See* 20 C.F.R.
21 §§ 404.900(a)(3), 416.1400(a)(3). The ALJ issues a written decision after the hearing. *See* 20
22 C.F.R. § 404.900(a)(3). If the ALJ denies the claim, the claimant may request review by the
23 Appeals Council. *See* 20 C.F.R. §§ 404.900(a)(4), 416.1400(a)(4). If the Appeals Council

1 determines there is merit to the claim, it generally remands the case to the ALJ for a new hearing.
2 If the Appeals Council denies review, the claimant can file an action in the United States District
3 Court. *See* 42 U.S.C. § 405(g); 20 C.F.R. §§ 404.900(a)(5), 416.1400(a)(5).

4 **B. Five-Step Evaluation of Disability**

5 Under the Social Security Act, "disability" is the inability to engage "in any substantial
6 gainful activity by reason of any medically determinable physical or mental impairment which can
7 be expected to result in death or which has lasted or can be expected to last for a continuous period
8 of not less than 12 months." 42 U.S.C. § 1382c(a)(3)(A). A claimant is disabled if his or her
9 physical or mental impairment(s) are so severe as to preclude the claimant from doing not only his
10 or her previous work but also, any other work which exists in the national economy, considering
11 his age, education and work experience. 42 U.S.C. § 1382c(a)(3)(B).

12 The Commissioner has established a five-step sequential process for determining whether
13 a person is disabled. 20 C.F.R. §404.1520 and § 416.920; *see also Bowen v. Yuckert*, 482 U.S.
14 137, 140-41 (1987). In the first step, the Commissioner determines whether the claimant is engaged
15 in "substantial gainful activity"; if so, a finding of nondisability is made and the claim is denied.
16 20 C.F.R. § 404.152(a)(4)(i), (b); § 416.920(a)(4)(i); *Yuckert*, 482 U.S. at 140. If the claimant is
17 not engaged in substantial gainful activity, the Commissioner proceeds to step two.

18 The second step requires the Commissioner to determine whether the claimant's
19 impairment or combination of impairments are "severe." 20 C.F.R. § 404.1520(a)(4)(ii), (c) and
20 § 416.920(a)(4)(ii), (c); *Yuckert*, 482 U.S. at 140-41. An impairment is severe if it significantly
21 limits the claimant's physical or mental ability to do basic work activities. *Id.* If the claimant has
22 an impairment(s) that is severe, the Commissioner proceeds to step three.

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1 In the third step, the Commissioner looks at a number of specific impairments listed in
2 20 C.F.R. Part 404, Subpart P, Appendix 1 (Listed Impairments) and determines whether the
3 claimant's impairment(s) meets or is the equivalent of one of the Listed Impairments. 20 C.F.R.
4 § 404.1520(a)(4)(iii), (d) and § 416.920(a)(4)(iii), (d). The Commissioner presumes the Listed
5 Impairments are severe enough to preclude any gainful activity, regardless of age, education or
6 work experience. 20 C.F.R. § 404.1525(a), § 416.925(a). If the claimant's impairment meets or
7 equals one of the Listed Impairments, and is of sufficient duration, the claimant is conclusively
8 presumed disabled. 20 C.F.R. § 404.1520(a)(4)(iii), (d), § 416.920(a)(4)(iii), (d). If the claimant's
9 impairment is severe, but does not meet or equal one of the Listed Impairments, the Commissioner
10 proceeds to step four. *Yuckert*, 482 U.S. at 141.

11 At step four, the Commissioner determines whether the claimant can still perform "past
12 relevant work." 20 C.F.R. § 404.1520(a)(4)(iv), (e), (f) and § 416.920(a)(4)(iv), (e), (f). Past
13 relevant work is that which a claimant performed in the last 15 years, which lasted long enough
14 for him or her to learn to do it, and was substantial gainful activity. 20 C.F.R. § 404.1565(a) and
15 § 416.920(a).

16 In making this determination, the Commissioner assesses the claimant's residual functional
17 capacity (RFC) and the physical and mental demands of the work previously performed. *See id.*;
18 20 C.F.R. § 404.1520(a)(4)(v), § 416.920(a)(4)(v); *see also Berry v. Astrue*, 622 F.3d 1228, 1231
19 (9th Cir. 2010). RFC is what the claimant can still do despite his or her limitations. 20 C.F.R.
20 § 404.1545 and § 416.945. In determining the RFC, the Commissioner must assess all evidence,
21 including the claimant's and others' descriptions of the limitation(s), and medical reports, to
22 determine what capacity the claimant has for work despite his or her impairments. 20 C.F.R.
23 § 404.1545(a)(3) and 416.945(a)(3).

1 A claimant can return to previous work if he or she can perform the "actual functional
2 demands and job duties of a particular pat relevant job" or "[t]he functional demands and job duties
3 of the [past] occupation as generally required by employers throughout the national economy."
4 *Pinto v. Massanari*, 249 F.3d 840, 845 (9th Cir. 2001) (internal quotation marks and citation
5 omitted).

6 If the claimant can still do past relevant work, then he or she is not disabled. 20 C.F.R.
7 § 404.1520(f) and § 416.920(f); *see also Berry*, 62 F.3d at 131.

8 If, however, the claimant cannot perform past relevant work, the burden shifts to the
9 Commissioner to establish at step five that the claimant can perform other work available in the
10 national economy. 20 C.F.R. §§ 404.1520(e), 416.920(e); *see also Yuckert*, 482 U.S. at 141-42,
11 144. This means "work which exists in significant numbers either in the region where such
12 individual lives or in several regions of the country." *Gutierrez v. Comm'r of Soc. Sec. Admin.*, 740
13 F.3d 519, 528 (9th Cir. 2014). If the claimant cannot do the work he or she did in the past, the
14 Commissioner must consider the claimant's RFC, age, education, and past work experience to
15 determine whether the claimant can do other work. *Yuckert*, 482 U.S. at 141-42. The
16 Commissioner may meet this burden either through the testimony of a VE or by reference to the
17 Grids. *Tackett v. Apfel*, 180 F.3d 1094, 1100 (9th Cir. 1999).

18 If at step five the Commissioner establishes that the claimant can do other work which
19 exists in the national economy, then he or she is not disabled. 20 C.F.R. § 404.1566(b),
20 § 416.966(b). Conversely, if the Commissioner determines the claimant unable to adjust to any
21 other work, the claimant will be found disabled. 20 C.F.R. § 404.1520(g), § 416.920(g); *see also*
22 *Lockwood*, 616 F.3d at 1071; *Valentine v. Comm'r of Soc. Sec. Admin.*, 574 F.3d 685, 689 (9th Cir.
23 2009).

1 **C. Judicial Review & Substantial Evidence**

2 The court must affirm the ALJ's determination if it is based on proper legal standards and
3 the findings are supported by substantial evidence in the record. *Gutierrez*, 740 F.3d at 522 (citing
4 42 U.S.C. § 405(g)). "Substantial evidence is 'more than a mere scintilla but less than a
5 preponderance; it is such relevant evidence as a reasonable mind might accept as adequate to
6 support a conclusion." *Id.* at 523-24 (quoting *Hill v. Astrue*, 698 F.3d 1153, 1159 (9th Cir. 2012)).

7 To determine whether substantial evidence exists, the court must look at the record as a
8 whole, considering both evidence that supports and undermines the ALJ's decision. *Gutierrez*, 740
9 F.3d at 524 (citing *Mayes v. Massanari*, 276 F.3d 453, 459 (9th Cir. 2001)). The court "'may not
10 affirm simply by isolating a specific quantum of supporting evidence.'" *Garrison v. Colvin*, 759
11 F.3d 995, 1009 (9th Cir. 2014) (quoting *Lingenfelter v. Astrue*, 504 F.3d 1028, 1035 (9th Cir.
12 2007)). "'The ALJ is responsible for determining credibility, resolving conflicts in medical
13 testimony, and for resolving ambiguities.'" *Id.* (quoting *Andrews v. Shalala*, 53 F.3d 1035, 1039
14 (9th Cir. 1995)). "If the evidence can reasonably support either affirming or reversing, 'the
15 reviewing court may not substitute its judgment' for that of the Commissioner." *Gutierrez*, 740
16 F.3d at 524 (quoting *Reddick v. Chater*, 157 F.3d 715, 720-21 (9th Cir. 1996)). That being said, "a
17 decision supported by substantial evidence will still be set aside if the ALJ did not apply proper
18 legal standards." *Id.* (citing *Bray v. Comm'r of Soc. Sec. Admin.*, 554 F.3d 1219, 1222 (9th Cir.
19 2009); *Benton v. Barnhart*, 331 F.3d 1030, 1035 (9th Cir. 2003)). In addition, the court will "review
20 only the reasons provided by the ALJ in the disability determination and may not affirm the ALJ
21 on a ground upon which he did not rely." *Garrison*, 759 F.3d at 1010 (citing *Connett v. Barnhart*,
22 340 F.3d 871, 874 (9th Cir. 2003)).

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III. DISCUSSION

A. ALJ's Findings in this Case

At step one, the ALJ found Plaintiff met the insured status requirements through December 31, 2018, and had not engaged in substantial gainful activity since the alleged onset date of June 12, 2014. (AR 15.)

At step two, the ALJ concluded Plaintiff had the following severe impairment: status post implantation of deep brain stimulator to control tremors. (AR 15.)

At step three, the ALJ determined Plaintiff did not have an impairment or combination of impairments that met or medically equaled the severity of one of the Listed Impairments. (AR 15.)

At step four, the ALJ assessed Plaintiff as having the RFC to perform light work as defined in 20 C.F.R. § 404.1567(b), except she could lift 20 pounds; sit, stand and walk for six hours in an eight-hour day; and, use the hands on an occasional basis for work-related activities. The ALJ also found that Plaintiff had no significant work-related mental health limitations. (AR 15-20.)

The ALJ then concluded Plaintiff was unable to perform any of her past relevant work. (AR 20.)

At step five, the ALJ determined, based on VE testimony, that considering Plaintiff's age, education, work experience and RFC, there were jobs that existed in significant numbers in the national economy that Plaintiff could perform, including: call out operator (Dictionary of Occupational Titles (DOT) number 237.367-014); and surveillance system monitor (DOT number 379.367-010). (AR 21.) As a result, the ALJ found Plaintiff not disabled from June 12, 2014, through the date of the decision—April 26, 2017. (AR 21.)

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1 **B. Relevant Evidence**

2 **1. Medical Records**

3 According to the medical records, Plaintiff suffered from an essential tremor for
4 approximately 16 years before being evaluated by Dr. Bordelon at UCLA's Movement Disorders
5 Clinic for placement of a deep brain stimulator (DBS) to manage her tremor. Initially, the tremor
6 affected mainly her right hand, but she later began to experience symptoms in her left hand as well.
7 She occasionally had a tremor in her head and legs, as well as a vocal tremor. The tremor became
8 more pronounced during times of stress or anxiety. At the point when she consulted with
9 Dr. Bordelon, she had failed multiple medication trials, and she reported the tremor significantly
10 impaired her ability to independently function. She had to use two hands to complete routine
11 activities of daily living, including eating, drinking, dressing and hygiene. She had stopped
12 working because it had been difficult to use her hand in retail sales. (AR 276-80.)

13 Plaintiff underwent surgery for placement of the DBS on June 12 and 24, 2014. (AR 280-
14 286.) She saw Dr. Bordelon for initial programming of the DBS on July 2, 2014, and at that point
15 she reported a new onset of bilateral headaches since the surgery. She had some improvement for
16 the headaches with taking Tylenol. She did not feel any improvement regarding her tremor since
17 the surgery. Despite the headaches, she was described as doing quite well. (AR 321-23.) At a
18 follow up on August 13, 2014, the headaches persisted. They occurred daily, and waxed and waned
19 throughout the day. The headaches caused her to stay home and not go outside. Again, she reported
20 some improvement when taking Tylenol. Regarding the surgery and her tremor, she felt no
21 difference. The tremor would get worse as the headaches got worse. She continued to have
22 problems drinking with a cup. (AR 317.) On examination, mild clumsiness of the right hand was
23 noted, which was not seen before (the surgery). Dr. Bordelon tried increasing the voltage on the

1 device, but this resulted in side effects, including lip twitching and shortness of breath, and
2 tingling. They tried another configuration and Plaintiff would be monitored. (AR 319.)

3 A progress note from September 21, 2014 from Ajitpal Tiwana, M.D., states that it was
4 recommended that Plaintiff refrain from working due to bilateral hand tremors that impair many
5 of her activities of daily living including writing, typing and drinking. It was noted that it could
6 take six to eight months for the surgery to help control the tremors. She was also suffering from
7 post-surgical headaches, which were also described as moderate to severe migraines, where she
8 cannot tolerate any light or sound and has to stay indoors. The migraines occurred for hours in a
9 day and were unpredictable in nature. (AR 319-320, 378.)

10 In October of 2014, she indicated she had minimal improvement in the tremor since the
11 surgery. She still had headaches with associated photophobia, and did not leave the house most
12 days, but the headaches had improved since the last appointment. That day, she had a moderate
13 right-sided tremor, especially with holding her hands up. She also had a mild left kinetic tremor.
14 (AR 379.)

15 She reported minimal improvement in the tremor at her February 4, 2015 appointment. She
16 still had impairment when writing more than two or three sentences. She had to use two hands to
17 eat and drink from a cup, and had to drink fast. When typing, she had cramping and numbness in
18 her fingers. She had a moderate right-sided tremor especially when holding her hands up, which
19 got worse as she put her hand to her mouth. She also had a mild left kinetic tremor. The voltage
20 was increased and she experienced improvement in the tremor. (AR 381-83.)

21 Her next appointment was on May 14, 2015. She reported improvement in her handwriting,
22 but it was still difficult to write. She indicated that she would have improvement in the tremor for
23 about a week after the voltage change, but then she would return to baseline. Writing was difficult,

1 and she could only type for about five minutes before her hands would become numb. She had to
2 use two hands to drink out of a cup, and had difficulty eating. Activities of daily living such as
3 cleaning and working in the kitchen could be very difficult, and she could not use a knife to cut
4 safely. (AR 384-85.) She saw Dr. Bordelon again on May 27, 2015, who reported that in general,
5 Plaintiff had not responded as well to the surgery as they wanted her to. She had side effects with
6 configuration changes, and minimal improvement in her tremors. She still felt impaired in
7 activities of daily living, and especially with writing. She still had to use two hands to drink from
8 a cup, and could only eat with an enlarged spoon. Cleaning was still difficult. That day, she had
9 mild cogwheeling on the right upper extremity, and a mild action and posture tremor there as well.
10 A new configuration was tried, and she felt much improved. (AR 385-87.)

11 On September 9, 2015, she indicated that she had some mild benefit for the tremor for
12 about a month, but then it returned to essentially where it was before the surgery. She still reported
13 difficulty with activities of daily living, including drinking from a cup and writing. She also had
14 pain in both hands. She had a postural and kinetic tremor in the right upper and lower extremities.
15 Her handwriting was mildly impaired. She had increased tremor in the right hand when mimicking
16 drinking from a cup. The settings of the stimulator were adjusted. (AR 389-91.)

17 On December 1, 2015, she was still having tremors in both hands, and her whole body
18 would shake if she was nervous. She reported headaches and pain in her right wrist. She was
19 assessed with carpal tunnel syndrome. (AR 373-74.)

20 She saw Dr. Bordelon on January 27, 2016, and indicated that she initially benefitted after
21 the last change of settings, but over time the tremor went back to baseline. She also noted a tremor
22 beginning to bother her left hand. She was also depressed and had anxiety, which aggravated the
23 tremor. She had a postural and kinetic tremor in the right upper extremity, and had mild difficulty

1 with tandem gait. Since undergoing surgery, her improvement was described as modest. The
2 voltage was adjusted to try and manage the tremor. (AR 391-394.)

3 On February 25, 2016, she was still having tremors in both hands, and pain in both wrists.
4 She was assessed with right median sensory/motor neuropathy at the wrist, consistent with mild
5 carpal tunnel syndrome. (AR 370.)

6 When she saw Dr. Bordelon on April 6, 2016, she indicated that she had initial
7 improvement after the last stimulator configuration, but then her tremors returned. She had tried
8 increasing the voltage, but felt side effects of increasing anxiety and palpitations. In general, she
9 felt the tremor was unchanged and continued to be debilitating, especially when she focused on
10 fine motor tasks, in which case a tremor developed in the left hand as well. The configuration was
11 adjusted again, and discussed the option of implanting a device for the tremor in the left hand, but
12 she was cautioned that the side effects were much higher with bilateral stimulation. (AR 394-96.)

13 On April 15, 2016, she continued to have tremors in both upper extremities, which were
14 worse on the right, and pain and numbness in the wrist. On examination, a tremor in both upper
15 extremities was observed. (AR 368.)

16 When she saw Dr. Bordelon on August 17, 2016, she felt that the DBS was not making
17 much difference. She was still having issues eating and drinking. She felt the tremor in the left
18 hand was getting worse. On examination, she had a right upper extremity tremor at rest, but this
19 resolved with distraction. She also had a postural and kinetic tremor in the right upper extremity,
20 and a mild postural tremor in the left hand when demonstrating holding a mirror. The stimulator
21 was adjusted, which greatly improved the tremor. (AR 397-99.)

22 At her November 2, 2016 appointment, she reported doing well and liked the configuration
23 she was using, and felt the right upper extremity tremor was improved. She described having

1 significant improvement since the last adjustment. She still had some tremor and mild difficulty
2 eating, but noticed a "marked improvement." She had some mild side effects but they were
3 manageable. On examination, she had a very mild bilateral upper extremity kinetic tremor, and
4 had mild difficulty with tandem gait. Dr. Bordelon stated that the most recent programming had
5 greatly improved her tremor. (AR 402.)

6 **2. Medical Opinions**

7 State agency reviewing physician Crystal Fo, M.D., opined on October 2, 2014, that
8 Plaintiff could use her right hand frequently, and left hand occasionally, and should avoid
9 concentrated noise exposure due to her headaches. (AR 114.) State agency reviewing physician,
10 A. Resnik, M.D., adopted the same opinions on March 11, 2015 (at the reconsideration level).
11 (AR 127.)

12 Dr. Bordelon completed a residual functional capacity questionnaire on August 22, 2016.
13 (AR 376-77.) She opined that Plaintiff could sit, stand and walk less than four hours in an eight-
14 hour day; she could rarely lift and carry up to ten pounds due to her tremor; she could not use her
15 hands for handling, pushing and pulling or fine manipulation; she had manual and finger dexterity
16 estimated in percentile comparison to general population of 11 to 33 percent in the right and left;
17 she could rarely crawl, climb, reach up or reach forward; she could frequently bend/stoop, squat,
18 crouch and kneel (noting that balance was difficult due to her tremor); she could never tolerate
19 exposure to unprotected heights, being around moving machinery, being exposed to marked
20 temperature changes, being exposed to dust, fumes and other irritants, or noise; she could
21 frequently drive (but not heavy machinery).

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3. Hearing Testimony and Functional Statements

On March 27, 2017, Plaintiff testified that she had stopped working after her brain surgery. She had expected to go back to work after the surgery and her recovery, but she did not get any better. (AR 71.) She testified that her hands would still shake and it was hard to hold anything. She was sensitive to light and had bad migraines. (AR 71.)

The ALJ specifically asked her about the progress note entry from November 2, 2016, which noted marked improvement in her tremor. She testified that the DBS procedure had helped in some ways, but she still had shaking in her hands. She still had difficulty eating, and had to eat with a spoon, and very fast to keep the food from falling out of the spoon. (AR 72.)

In a typical day, she would wake up and get her children up and off to school. Then she would do some light cleaning at home, shower, and makes her bed. Her mom visited during mid-morning to help her. When her kids got home from school, she watched over them while they did their homework. (AR 72.)

Her children did the chores around the home. She could wipe down the bathroom sink with a rag and wipe, but could not do scrubbing. She could wash a cup and plate, but did not wash pans. She did light cooking to prepare simple meals, and the kids helped her, including with chopping. (AR 73.) She could throw a load of laundry in the washer, and her children would take it out and put it in the dryer. She could pick items at the grocery store, but had her children push the cart for her, and she did not hold, load or unload the groceries. She could watch television and read. She could use the mouse for the computer, and could type her name and address. (AR74.) She used a Bluetooth headset for the phone. (AR 74.) She could not exercise and had no hobbies. (AR 75.) Her mother and oldest daughter help her "100%" with her other children. (AR 78.) On an average day, she would rest for about an hour at about 2:00 p.m., to try and relax her body. (AR 78.)

1 She estimated she could lift five pounds; she could stand 10 minutes before her back started
2 to hurt and she would need to move around; she could walk for 15 minutes; and, she could sit for
3 10 minutes. (AR 79-80.)

4 She confirmed that the tremors were her only limitations. She took medication for the
5 tremors, which helped some, but not a lot. She also took ibuprofen for pain. (AR 75.) Stress
6 aggravated her tremors. (AR 77.)

7 She did not feel she could do the cashier work she did in the past because her hands start
8 shaking really badly when she starts lifting anything. (AR 76.) Pushing numbers also caused her
9 hands to cramp up. (AR 76.)

10 Plaintiff completed an adult function report, and stated that her shaking in the right hand
11 had limited her ability to write, type and pick up heavy objects. Both hands would stiffen up while
12 holding a heavy object or doing something for long periods of time. (AR 216.) She did light
13 cleaning and light cooking with the help of her children. (AR 217.) She did small chores such as
14 making the bed and wiping down the counters with the help of her children. (AR 219.) Household
15 chores caused her hand to shake badly, and she did not do yard work. She needed help all the time
16 to open doors, push carts and pick up heavy objects when she would go out. (AR 220.) She could
17 drive only short distances. (AR 220.) Her children helped her to push the cart, lift and bag while
18 shopping. (AR 220.) She liked to read, but she could not hold a book or tablet because her hand
19 starts to shake and cause her pain. (AR 221.) Since her surgery, she would go places with her
20 children or a family member in case she had head pain or needed help opening or carrying objects.
21 (AR 221.) She had difficulty lifting, and with reaching her hand would shake and her hand and
22 arm would become numb. (AR 222.) Stress triggered her tremors. (AR 223.)
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1 Her daughter completed a third-party adult function report, and stated that Plaintiff's right
2 hand would shake uncontrollably, and it was hard for her to work or do household chores, or her
3 duties as a mother. (AR 226.) The children helped her to prepare meals and do chores. (AR 227.)

4 **4. ALJ's Findings**

5 While the ALJ found Plaintiff's medically determinable impairment could reasonably be
6 expected to cause her alleged symptoms, he found her statements concerning the intensity,
7 persistence and limiting effects of the symptoms were not entirely consistent with the medical
8 evidence and other evidence in the record. (AR 16.)

9 The ALJ stated that while Plaintiff claimed that her tremor prevents her from working, she
10 did light cleaning and cooking with the assistance of her children; she took care of her children;
11 she prepared simple meals; she cleaned; made her bed; wiped down counters; she went outside
12 once or twice a week; she shopped in stores and handled her finances; and, she had no problem
13 with personal care. (AR 16-17.) She reported she could not lift or reach because her hand would
14 shake, but the ALJ pointed out that she drives, goes grocery shopping once a week, goes to church
15 on a regular basis and had no problems getting along with others. (AR 17.)

16 The ALJ stated that the record did not document objective clinical findings establishing
17 Plaintiff was not able to perform work. The ALJ concluded that her tremor did not appear to limit
18 her ability to perform work related activities. The ALJ then summarized the medical records.

19 The ALJ stated that despite Plaintiff's alleged impairments, she engaged in somewhat
20 normal level of daily activity, and her ability to do so undermined the consistency of her allegations
21 of disabling functional limitations. The ALJ concluded that the record reflected that the surgery
22 was generally successful in relieving the symptoms. In addition, she had been prescribed
23 medications that were relatively effective in controlling her symptoms.

1 The ALJ also stated that the objective findings overall were minimal; her complaints were
2 not consistent; and treatment since surgery had been conservative and was generally limited to
3 medication. He again stated that she cooked, did small chores, made her bed, wiped down counters,
4 shopped, took care of her children, went to church and helped her children with their schoolwork.
5 (AR 18.)

6 The ALJ addressed the opinions of the State agency reviewing physicians, and gave these
7 opinions little weight because they were less limiting than what was indicated by the medical
8 records. (AR 18-19.)

9 The ALJ noted the opinions of Plaintiff's treating physician, Dr. Laurice T. Yang, in
10 September 21, 2014, and May 14, 2015, that Plaintiff could not obtain employment due to her
11 tremors. (AR 19.) The ALJ did not give Dr. Yang's opinions great weight, finding that Plaintiff's
12 own testimony contradicted the opinions and were at odds with findings on examination and recent
13 treatment notes documenting marked improvement in her symptoms. (AR 19.)

14 The ALJ also discussed Dr. Bordelon's residual functional questionnaire. The ALJ said he
15 did not give Dr. Bordelon's opinions great weight because they were directly contradicted by
16 Plaintiff's own testimony, and were at odds with findings on examination and recent treatment
17 notes documenting marked improvement in her symptoms. (AR 19.)

18 **C. Evaluation of Medical Opinions**

19 “In disability benefits cases ... physicians may render medical, clinical opinions, or they
20 may render opinions on the ultimate issue of disability—the claimant’s ability to perform work.”
21 *Garrison v. Colvin*, 759 F.3d 995, 1012 (9th Cir. 2014) (quoting *Reddick v. Chater*, 157 F.3d 715,
22 725 (9th Cir. 1998)). “Courts ‘distinguish among the opinions of three types of physicians:
23 (1) those who treat the claimant (treating physicians); (2) those who examine but do not treat the

1 claimant (examining physician); and (3) those who neither examine nor treat the claimant
2 (nonexamining physicians).” *Garrison*, 759 F.3d at 1012 (quoting *Lester v. Chater*, 81 F.3d 821,
3 830 (9th Cir. 1995)). ““As a general rule, more weight should be given to the opinion of a treating
4 source than to the opinion of doctors who do not treat the claimant.” *Id.* “[T]he opinion of a
5 treating physician is thus entitled to greater weight than that of an examining physician, [and] the
6 opinion of an examining physician is entitled to greater weight than that of a non-examining
7 physician.” *Garrison*, 759 F.3d at 1012 (citing *Ryan*, 528 F.3d at 1198).

8 “If a treating physician’s opinion is well-supported by medically acceptable clinical and
9 laboratory diagnostic techniques and is not inconsistent with the other substantial evidence in [the]
10 case record, [it will be given] controlling weight.” *Ghanim v. Colvin*, 763 F.3d 1154, 1160 (9th
11 Cir. 2014) (citation and quotation marks omitted); *see also Revels v. Berryhill*, 874 F.3d 648, 654
12 (9th Cir. 2017) (citing 20 C.F.R. § 404.1527(c)(2))). “Greater weight is also given to the ‘opinion
13 of a specialist about medical issues related to his or her area of specialty.’” *Revels*, 874 F.3d at 654
14 (citing 20 C.F.R. § 404.1527(c)(5)). ““The weight afforded a non-examining physician’s testimony
15 depends on the degree to which [he or she] provide[s] supporting explanations for [his or her]
16 opinions.” *Garrison*, 759 F.3d at 1012.

17 “To reject [the] uncontradicted opinion of a treating or examining doctor, an ALJ must
18 state clear and convincing reasons that are supported by substantial evidence.” *Ryan v. Comm’r of*
19 *Soc. Sec.*, 528 F.3d 1194, 1198 (9th Cir. 2008) (citation omitted). “If a treating or examining
20 doctor’s opinion is contradicted by another doctor’s opinion, an ALJ may only reject it by
21 providing specific and legitimate reasons that are supported by substantial evidence.” *Garrison*,
22 759 F.3d at 1012. “[E]ven when contradicted, a treating or examining physician’s opinion is still
23 owed deference and will often be ‘entitled to the greatest weight ... even if it does not meet the

1 test for controlling weight.” *Garrison*, 759 F.3d at 1012 (quoting *Orn v. Astrue*, 495 F.3d 625,
2 633 (9th Cir. 2007)). “An ALJ can satisfy the ‘substantial evidence’ requirement by ‘setting out a
3 detailed and thorough summary of the facts and conflicting clinical evidence, stating his
4 interpretation thereof, and making findings.” *Garrison*, 759 F.3d at 1012 (quoting *Reddick*, 157
5 F.3d at 725). “‘The ALJ must do more than state conclusions. He must set forth his own
6 interpretations and explain why they, rather than the doctors’, are correct.’” *Id.* (citation omitted).

7 **D. Analysis**

8 The ALJ rejected Dr. Bordelon's opinions because he found the opinions were:
9 (1) contradicted by Plaintiff's own testimony, and (2) were at odds with her more recent treatment
10 notes that documented marked improvement in Plaintiff's symptoms.

11 **1. Does Substantial Evidence Support the ALJ's Conclusion that Dr. Bordelon's** 12 **Opinions were Contradicted by Plaintiff's Own Testimony?**

13 First, Plaintiff acknowledges that an ALJ may discount a treating physician's opinion when
14 the opinion is inconsistent with the claimant's testimony. Plaintiff argues, however, that the ALJ
15 must articulate what testimony contradicts the opinion and the ALJ failed to do so here. In addition,
16 Plaintiff argues that Dr. Bordelon's opinion was offered in the context of work-related limitations,
17 and Plaintiff's testimony about her daily activities reflected her abilities in a typical day where she
18 could receive help, rest, and perform activities at her own pace. Finally, Plaintiff contends that her
19 testimony was not in fact inconsistent with Dr. Bordelon's opinions. She points to her testimony
20 that her mother and daughter help her; her mother drove her to her appointments at UCLA; her
21 children did chores and helped with preparing meals, washing dishes, and doing laundry; she had
22 difficulty lifting things, and pushing numbers would cause her hands to cramp up; she could not
23 lift a gallon of milk with one hand; and she could not hold a cup of water to drink without shaking.

1 The Commissioner argues that the ALJ may properly reject the opinions of a treating
2 physician of further limitation beyond the assessed RFC based on inconsistency between the
3 opinions and Plaintiff's daily activities. To support the ALJ's decision, the Commissioner points to
4 Plaintiff's ability to: drive; prepare simple meals; make her bed; wipe down counters; put a laundry
5 load in; shop in stores; and, handle her own personal care and finances. The Commissioner
6 contends that her ability to do these activities is consistent with a finding that Plaintiff could use
7 her hands for work activities up to an occasional basis.

8 The question is whether substantial evidence supports a finding that there was
9 inconsistency between Plaintiff's testimony and Dr. Bordelon's opinions.

10 Critical here are Dr. Bordelon's opinions that Plaintiff could rarely lift and carry up to ten
11 pounds due to her tremor; she could not use her hands for handling, pushing and pulling or fine
12 manipulation; she had manual and finger dexterity estimated in percentile comparison to general
13 population of 11 to 33 percent in the right and left. Occasional means "from very little up to one-
14 third of the time." SSR 83-10, 1983 WL 31251, at * 5. So, Plaintiff would use her hands at most,
15 for one-third of the day.

16 The court finds that insofar as the ALJ rejected Dr. Bordelon's opinions because they were
17 inconsistent with Plaintiff's testimony, the ALJ's determination is not supported by substantial
18 evidence in the record.

19 First, as Plaintiff points out, the ALJ did not describe *what* he found to be contradictory
20 about Plaintiff's testimony when compared to Dr. Bordelon's opinions. When rejecting a treating
21 physician's opinions, the ALJ "must do more than state conclusions. He must set forth *his own*
22 *interpretations and explain why* they, rather than the doctors', are correct." *Garrison*, 759 F.3d at
23 1012 (citation omitted).

1 Second, the ALJ impermissibly ignored or understated Plaintiff's testimony concerning the
2 limited nature of what she can do. In addition, for most activities the ALJ relied, the ALJ did not
3 acknowledge her testimony that she performed these activities with the help of her children and
4 mother. In *Garrison v. Colvin*, 759 F.3d 995, 1016 (9th Cir. 2014), the Ninth Circuit found that
5 the ALJ erred where the ALJ mischaracterized the claimant's testimony when the ALJ ignored the
6 testimony that she was heavily assisted by her mother in performing many daily activities, and that
7 pain precluded her from engaging many activities and she required rest throughout the day. The
8 court reiterated that "impairments that would unquestionably preclude work and all the pressures
9 of a workplace environment will often be consistent with doing more than merely resting in bed
10 all day." *Id.* (citations omitted). The Ninth Circuit cited a decision of the Seventh Circuit noting
11 "[t]he critical differences between activities of daily living and activities in a full-time job[.]"
12 *Bjornson v. Astrue*, 671 F.3d 640, 647 (7th Cir. 2012). The Seventh Circuit noted that with the
13 former, a person has more flexibility in scheduling and can get assistance from others. *Id.* "The
14 failure to recognize these differences is a recurrent, and deplorable, feature of opinions by
15 administrative law judges in social security disability cases." *Id.*

16 Instead, Plaintiff's testimony appears to be consistent with Dr. Bordelon's opinions
17 regarding her ability to lift and utilize her hands. *See Garrison*, 759 F.3d at 1016 (finding that
18 claimant's testimony regarding daily activities with assistance and taking rests were consistent with
19 pain testimony and inability to function, and ALJ's reasoning did not satisfy the clear and
20 convincing reasons requirement to discredit the claimant's testimony).

21 Plaintiff testified that her hands would shake and it was hard to hold things. While she did
22 light cleaning, she clarified that this included wiping down the bathroom sink with a rag, but she
23 could not do any scrubbing, and her children performed most household chores. Her mother would

1 come visit her mid-morning to help her. She testified that she would watch over her kids while
2 they did their homework. It is not clear how helping with homework or watching over with
3 homework would contradict an opinion that she could not use her hands or lift over 10 pounds in
4 a work setting. She would do some light cleaning and light cooking, but she specifically testified
5 that her children helped do the chores and with preparing meals. She could wash a cup and a plate,
6 but could not wash pans. She could put a load of laundry into the washer, but her children had to
7 take it out and put it in the dryer. She testified that she did go grocery shopping, but her children
8 push the cart for her, and hold, load and unload the groceries. She stated that her mother and oldest
9 daughter help her "100%."

10 She clarified that she only drives short distances and did not have her own vehicle, and her
11 mother drove her to her doctor appointments at UCLA. She also testified that since her surgery,
12 she went places with her children or a family member in case she has head pain or needed help
13 opening or carrying objects.

14 In sum, the ALJ did not set forth sufficient reasons supported by substantial evidence in
15 the record in rejecting Dr. Bordelon's opinions.

16 **2. Does Substantial Evidence Support the ALJ's Conclusion that Dr. Bordelon's**
17 **Opinions Were at Odds with More Recent Treatment Notes that Documented Marked**
18 **Improvement in Plaintiff's Symptoms?**

19 Second, the ALJ rejected Dr. Bordelon's opinions because he found them at odds with
20 recent treatment notes that showed marked improvement. Plaintiff argues that these most recent
21 notes did not undermine the totality of Dr. Bordelon's opinions, asserting that periods of
22 improvement must be read in the context of the overall diagnostic picture, and the "marked"
23 improvement in November of 2016 is relative.

1 The Commissioner asserts that it was reasonable to find Plaintiff's condition had improved
2 where there were reports of "marked improvement" of her tremors.

3 The statement regarding marked improvement is in the last medical record from
4 Dr. Bordelon, from November 2, 2016. Up to that point, the records reflect that Plaintiff would get
5 temporary and minimal relief from the DBS stimulator, but then would return to baseline. She
6 continued to have trouble with the tremor.

7 The ALJ specifically asked Plaintiff about that particular progress note entry at the hearing,
8 and Plaintiff testified that the DBS procedure had helped in some ways, but she still had shaking
9 in her hands. In her function report, she indicated she was worse since the surgery. The ALJ also
10 did not mention her testimony or the medical record entries indicating that stress triggers her
11 tremors.

12 The ALJ said that Plaintiff's surgery and medication were successful in controlling her
13 tremor. She testified that she still had issues with the tremor, and that she took medication, which
14 helped some, but not a lot. She testified that her hands would shake badly when she tried to lift
15 anything, and pushing numbers causes her hands to cramp up.

16 In sum, the ALJ erred in picking one record noting improvement and ignoring the overall
17 picture of her condition, as well as her testimony concerning how she was affected by the tremor
18 post-November 2, 2016. *See Lester v. Chater*, 81 F.3d 821, 833 (9th Cir. 1995) (citations omitted)
19 ("Occasional symptom-free periods ... are not inconsistent with disability.").

20 **E. Harmless Error?**

21 Finally, the Commissioner argues that for the surveillance system monitor position, there
22 was no reaching, handling, fingering or feeling in the job. Therefore, the Commissioner argues
23 that even if the ALJ erred in rejecting Dr. Bordelon's opinion that Plaintiff could not use the upper

1 extremities for handling, pushing and pulling or performing fine manipulation, Plaintiff would still
2 be able to perform the surveillance job, and any error regarding the RFC limitation would be
3 harmless.

4 The description of the surveillance system monitor includes "[p]ush[ing] the hold button
5 to maintain surveillance of location where incident is developing" and "[a]djust[ing] monitor
6 controls when required to improve reception[.]" DOT 379.367-010. The DOT entry also states that
7 the job requires exerting up to 10 pounds of force occasionally, and a negligible amount of force
8 frequently. *Id.* It does state that the finger dexterity and manual dexterity were the lowest 1/3,
9 excluding the bottom 10%, and that the position would not require reaching, handling, fingering.
10 *Id.*

11 Without the benefit of VE testimony on the topic, the job description of requiring pushing
12 buttons and adjusting controls seems to contradict the statement that the job includes no reaching,
13 handling or fingering. There is evidence in the record that Plaintiff's tremor was exacerbated when
14 she had to lift her hands, and that her hands became numb when pushing. In addition, the
15 description says that the job would require exerting up to 10 pounds of force occasionally... to
16 "lift, carry, push, pull or otherwise move objects[.]. This appears contradictory to Dr. Bordelon's
17 opinion that Plaintiff could lift/carry 10 pounds rarely.

18 In the absence of VE testimony on this issue, the court cannot conclude that the error would
19 be harmless insofar as the DOT description of the surveillance system monitor position is
20 concerned.

21 **F. Remand for Further Proceedings or for Calculation and Award of Benefits**

22 Plaintiff seeks an order reversing the final decision of the Commissioner and ordering the
23 payment of benefits. Alternatively, she asks for a remand for further administrative proceedings.

1 "The decision whether to remand a case for additional evidence, or simply to award
2 benefits[,] is within the discretion of the court." *Revels v. Berryhill*, 874 F.3d 648, 668 (9th Cir.
3 2017) (citation and quotation marks omitted); *see also Leon v. Berryhill*, 880 F.3d 1041, 1044 (9th
4 Cir. 2017), *as amended* January 25, 2018 (The credit-as-true "rule itself permits, but does not
5 require, a direct award of benefits on review..."). "[I]f additional proceedings can remedy defects
6 in the original administrative proceeding, a social security case should be remanded for further
7 proceedings." *Revels*, 874 F.3d at 668 (citation and quotation marks omitted).

8 "An automatic award of benefits in a disability benefits case is a rare and prophylactic
9 exception to the well-established ordinary remand rule." *Leon*, 880 F.3d at 1044 (citation omitted).
10 That is to say, "[w]hen the ALJ denies benefits and the finds error, the court ordinarily must remand
11 to the agency for further proceedings before directing an award of benefits." *Id.* at 1045 (citation
12 omitted).

13 A case *may* be remanded for the calculation and award of benefits if several criteria are
14 met. First, the ALJ must have "failed to provide legally sufficient reasons for rejecting evidence,
15 whether claimant testimony or medical opinion." *Leon*, 880 F.3d at 1045. Second, the record must
16 be fully developed such that further administrative proceedings would serve no useful purpose.
17 *Id.*; *see also Revels*, 874 F.3d at 668. When these two conditions are satisfied, the improperly
18 discredited evidence is credited as true, and the court must determine whether the ALJ would be
19 required to find the claimant disabled on remand and whether "on the record taken as a whole,
20 there is no doubt as to disability." *Leon*, 880 F.3d at 1045; *Revels*, 874 F.3d at 668.

21 Here, the court has determined that the ALJ failed to provide legally sufficient reasons for
22 rejecting Dr. Bordelon's opinions, satisfying the first factor of the credit-as-true criteria.

1 Second, the court must determine whether the record is fully developed and if further
2 administrative proceedings would serve any useful purpose, and whether there is any question as
3 to whether Plaintiff qualifies as disabled.

4 A problem with the record that the court observes is that Dr. Bordelon's opinion was
5 rendered in March of 2016. The record noting marked improvement was from November of 2016.
6 Plaintiff reported still suffering from the effects of the tremor, difficulty eating and holding items,
7 when she testified in March of 2017. It would have been helpful to have an updated opinion from
8 Dr. Bordelon that post-dated the November 2, 2016 record, indicating whether the opinions
9 remained the same, or some sort of reconciliation of this issue by the ALJ.

10 Additionally, it is not clear on the current record whether Plaintiff could perform the
11 surveillance system monitor job given her upper extremity limitations.

12 With this in mind, the court finds that the Commissioner's decision should be reversed and
13 remanded for further proceedings, instead of reversed for the calculation and award of benefits.

14 With these issues in mind, it is recommended that this matter be remanded for further
15 proceedings so that the ALJ may obtain an updated functional opinion from Dr. Bordelon and
16 determine, likely in conjunction with VE testimony, whether other work still exists in significant
17 numbers in the national economy that Plaintiff could perform given her limitations.

18 **IV. RECOMMENDATION**

19 IT IS HEREBY RECOMMENDED that the District Judge enter an order: **GRANTING**
20 Plaintiff's motion (ECF No. 13) and **REVERSING AND REMANDING** the decision of the
21 Commissioner for further proceedings consistent with this Report and Recommendation; and
22 **DENYING** the Commissioner's cross-motion (ECF No. 16).

23 ///

1 The parties should be aware of the following:

2 1. That they may file, pursuant to 28 U.S.C. § 636(b)(1)(C), specific written objections to
3 this Report and Recommendation within fourteen days of being served with a copy of the Report
4 and Recommendation. These objections should be titled “Objections to Magistrate Judge’s Report
5 and Recommendation” and should be accompanied by points and authorities for consideration by
6 the district judge.

7 2. That this Report and Recommendation is not an appealable order and that any notice of
8 appeal pursuant to Rule 4(a)(1) of the Federal Rules of Appellate Procedure should not be filed
9 until entry of judgment by the district court.

10 DATED: June 6, 2019.

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William G. Cobb
United States Magistrate Judge
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